

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JAMES L. LEMMONS
Claimant

VS.

RYDER INTEGRATED LOGISTICS, INC.
Self-Insured Respondent

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Docket No. 1,036,335

ORDER

Respondent appealed the January 13, 2011, post-award medical Award entered by Administrative Law Judge (ALJ) Nelsonna Potts Barnes.¹ The Board placed this appeal on its summary docket for disposition without oral argument.

APPEARANCES

Robert R. Lee of Wichita, Kansas, appeared for claimant. Randall W. Schroer of Kansas City, Missouri, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board is listed in the January 13, 2011, post-award medical Award.

ISSUES

1. Payment to claimant's wife for providing nursing care pursuant to K.A.R. 51-9-10(c).
2. If claimant's wife is to be compensated for her services as a home health care provider, the rate of her compensation and the amount of compensation due.

¹ It appears the Award was signed by ALJ Thomas Klein for ALJ Nelsonna Potts Barnes.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the parties' briefs, the Board finds and concludes:

Claimant filed an Application for Post Award Medical on December 24, 2009, requesting "Post-award medical and attorney fees." A post-award hearing was held on March 23, 2010. Specifically, claimant requested that his wife be paid \$12 per hour, 40 hours per week, to provide claimant home health care as claimant is significantly disabled. Claimant also requested reimbursement of \$50 for a portion of a medical bill paid by claimant's wife to Wesley Medical Center and to pay the outstanding medical bill owed to Wesley.

On March 16, 2009, claimant began treatment with Dr. Jeanette Salone, a physical medicine and rehabilitation specialist.² It appears Dr. Salone was authorized by the ALJ on or before August 25, 2010.³

Due to claimant's significant physical problems related to his work-related injuries, respondent retained a company known as Homewatch CareGivers of South Central Kansas (Homewatch) to provide claimant home health care services nine hours a day, five days a week. At the March 23, 2010, post-award hearing, claimant requested his wife be substituted as the provider for home health care and that she be paid for eight hours a day, five days a week at \$12 per hour.⁴

On January 13, 2011, the ALJ issued a post-award medical Award. The ALJ denied claimant's request for payment of the Wesley Medical Center bill and reimbursement of claimant's payment of \$50 toward the same for lack of foundation for the admission of records until such time as the records are properly submitted.⁵

The ALJ granted claimant's request for compensation for claimant's wife to serve as claimant's home health care provider and indicated Dr. Paul S. Stein opined claimant's wife is capable of providing home health services for claimant. In essence, the ALJ reasoned that claimant's wife is an authorized health care provider and awarded claimant's wife compensation for her services. The ALJ stated in the Award:

² Salone Depo. at 12.

³ ALJ Order (Aug. 25, 2010).

⁴ P.A.H. Trans. (Mar. 23, 2010) at 11-12.

⁵ ALJ Award (Jan. 13, 2011) at 2.

In making the above findings, the Court rejects the Respondent's argument that Mrs. Lemmons is not entitled to compensation because the Respondent prefers to use Homewatch for all in-home care attendant services. K.A.R. 51-9-10(c) specifically allows nursing services to be provided by a family member and Claimant's wife is to be reimbursed for providing such services.⁶

The Award required respondent to compensate claimant's wife \$12.50 per hour for sixteen hours a day and \$8 per hour for eight hours a day after July 30, 2010, thereon. From December 9, 2009, through July 30, 2010, respondent was ordered to compensate claimant's wife \$12.50 per hour for seven hours a day and \$8 per hour for eight hours a day.⁷

In the January 13, 2011, Award, the ALJ indicated the Award was based upon claimant's December 24, 2009, application.⁸ The only post-award hearing transcript made part of the record was that of March 23, 2010.⁹ This was despite the fact claimant filed four applications for post-award medical subsequent to the one filed on December 24, 2009, and two hearings were held concerning post-award medical issues after March 23, 2010.

Respondent provided claimant with home health care from Homewatch nine hours a day, five days a week at claimant's request and claimant's counsel and claimant's wife indicated Homewatch did an adequate job.¹⁰ Respondent offered to have Homewatch provide home health care 24 hours a day for claimant. However, claimant seeks to have his wife provide home health care instead of Homewatch and seeks compensation for the time his spouse has provided home health care for him.¹¹

Respondent argues claimant's request is in essence a request for a change of health care provider pursuant to K.S.A. 44-510h. Citing K.S.A. 44-510h(b)(1), respondent argues only where an ALJ finds the services of an authorized physician are not satisfactory can a new health care provider be appointed.¹² K.S.A. 44-510h states in part:

⁶ *Id.*, at 5.

⁷ *Id.*, at 5-6.

⁸ *Id.*, at 2.

⁹ *Id.*, at 1.

¹⁰ P.A.H. Trans. (Mar. 23, 2010) at 10, 31.

¹¹ *Id.*, at 10-12.

¹² Respondent's Brief at 1-2 (filed Feb. 14, 2011).

(a) It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515 and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

(b)(1) If the director finds, upon application of an injured employee, that the services of the health care provider furnished as provided in subsection (a) and rendered on behalf of the injured employee are not satisfactory, the director may authorize the appointment of some other health care provider. In any such case, the employer shall submit the names of three health care providers who, if possible given the availability of local health care providers, are not associated in practice together. The injured employee may select one from the list who shall be the authorized treating health care provider. If the injured employee is unable to obtain satisfactory services from any of the health care providers submitted by the employer under this paragraph, either party or both parties may request the director to select a treating health care provider.

(2) Without application or approval, an employee may consult a health care provider of the employee's choice for the purpose of examination, diagnosis or treatment, but the employer shall only be liable for the fees and charges of such health care provider up to a total amount of \$500. The amount allowed for such examination, diagnosis or treatment shall not be used to obtain a functional impairment rating. Any medical opinion obtained in violation of this prohibition shall not be admissible in any claim proceedings under the workers compensation act.¹³

Claimant relies on K.A.R. 51-9-10(c) which states:

Nurses, whether registered or practical, shall be furnished in an institution or the worker's home when the treating doctor recommends this nursing care. Nursing service by a member of the worker's family shall be provided if approved in advance by the treating physician.

This Board previously addressed a similar issue in *Shaw*.¹⁴ In that case, the ALJ determined in a post-award medical award that the claimant needed skilled nursing home care. The ALJ went on to conclude that although the treating physician designated a particular nursing home to provide the claimant's care, the designation of a specific nursing

¹³ K.S.A. 2007 Supp. 44-510h.

¹⁴ *Shaw v. Orscheln Farm Home Supply*, No. 202,218, 2010 WL 1918561 (Kan. WCAB Apr. 30, 2010).

home is not a medical issue. This Board concurred. The Board also considered a similar issue in *Finney*,¹⁵ but in that case the claimant's request for a particular facility was granted because he needed specialized care during his recovery from surgery.

One has to look carefully at the recommendations concerning home health care made by Dr. Paul S. Stein and Dr. Salone, two treating physicians in this case. Dr. Stein was authorized by ALJ Barnes as claimant's treating physician.¹⁶ After claimant visited Dr. Stein at claimant's attorney's request on May 4, 2010, Dr. Stein opined: "In my opinion Mr. Lemmons requires attendance of a caregiver on a relatively regular basis and it would appear that his wife is capable of providing such care."¹⁷ It appears Dr. Stein agreed with the recommendations of physical therapist Darla Harmon-Lyon, who evaluated claimant pursuant to Dr. Salone's orders and last saw claimant on November 19, 2009, which included that claimant needs 24-hour assistance. It should be noted Dr. Stein had not treated claimant on a regular basis since January 2009. There is scant evidence to support a finding that Dr. Stein gave advance approval for claimant's wife to provide home health care earlier than May 4, 2010. Dr. Stein's statement that claimant's wife, Rita Lemmons, is capable of providing home health care for her husband is different than advance approval.

Although Dr. Salone's deposition was taken on July 28, 2010, she had not seen claimant since May 20, 2010. Dr. Salone opined in a June 9, 2010, letter to respondent's counsel that: "I do not believe that Mr. James Lemmons needs any attendant care in his home."¹⁸ Dr. Salone did clarify that claimant needs someone around but that person does not need to provide attendant care 24 hours a day. Dr. Salone indicated she was not following the recommendations of Ms. Harmon-Lyon because claimant has better controlled his spasms with new medications. Significant is the fact that Dr. Salone's examination and subsequent opinion were rendered after claimant's spasms were reduced through a change of medication and the examination and subsequent opinion were several months after claimant last saw Ms. Harmon-Lyon. Dr. Salone indicated that claimant can be left alone and does not need 24-hour care and that if he has a spasm he can use Lifeline.¹⁹

¹⁵ *Finney v. Finns Electric Company, Inc.*, No 216,317, 2009 WL 3191371 (Kan. WCAB Sept. 18, 2009).

¹⁶ ALJ Order (Oct. 18, 2007).

¹⁷ Stein Depo. (May 26, 2010), Ex. 3 at 2.

¹⁸ Salone Depo., Ex. 2 at 2.

¹⁹ *Id.*, at 26-28.

Neither treating physician approved Rita Lemmons as a home health caregiver for her husband. Dr. Stein only indicated that Mrs. Lemmons is “capable of providing such care.”²⁰ Mrs. Lemmons testified that the services of Homewatch were satisfactory overall.²¹ Therefore, the Board finds that no treating physician gave advance approval for claimant’s wife to provide home health care and that respondent’s provision of home health care nine hours a day, five days a week is adequate and complies with Dr. Salone’s recommendations.

WHEREFORE, the Board reverses the January 13, 2011, post-award medical Award entered by ALJ Nelsonna Potts Barnes to deny claimant’s request for compensation to claimant’s wife for providing nursing care and finds respondent’s provision of home health care nine hours a day, five days a week adequate and reasonable.

IT IS SO ORDERED.

Dated this ____ day of April, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert R. Lee, Attorney for Claimant
Randall W. Schroer, Attorney for Respondent
Nelsonna Potts Barnes, Administrative Law Judge

²⁰ Stein Depo. (May 26, 2010), Ex. 3 at 2.

²¹ P.A.H. Trans. (Mar. 23, 2010) at 31.